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Supreme Court, U.S.
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No. 04-947

IN THE

Supreme Court of the United States

COLUMBIA RIVER CORRECTIONAL INSTITUTE, a State of Oregon Public Entity, et al.,

Petitioners,

v.

BILLY RAY PHIFFER, an individual,

Respondent.

Petition for Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

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REPLY BRIEF

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TABLE OF CONTENTS

Page

I. The Title II/Eleventh Amendment issue warrants this Court's review. 1

A. *Tennessee v. Lane* did not resolve the Title II issue presented here or mend the circuit split on that issue 1

B. The Title II abrogation issue is squarely presented here and is properly before the Court. 3

C. No fundamental rights are involved in this case. 5

II. The waiver and Section 504/Eleventh Amendment issues merit review. 7

A. Contrary to respondent's contention, this case does implicate a conflict in the circuits regarding waiver of sovereign immunity to Section 504 claims 7

B. The waiver issue is a significant one, and the question of whether Section 504 validly abrogates States' immunity is not "purely academic," as respondent suggests. 9

Conclusion 10

TABLE OF AUTHORITIES

Page

Cases Cited

Board of Trustees of the University of Alabama v. Garrett,
531 U.S. 356 (2001) 9

City of Boerne v. Flores,
521 U.S. 507 (1997) 9

Clark v. California,
123 F.3d 1267 (9th Cir.1997) 9

Cochran v. Pinchak,
401 F.3d 184, 2005 U.S. App. LEXIS
4261 (3d Cir. 2005) 2, 3, 6

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,
527 U.S. 666 (1999) 8, 9

Douglas v. California Dept. of Youth Auth.,
285 F.3d 1226 (9th Cir. 2002) 7

Garcia v. S.U.N.Y. Health Sciences Ctr.,
280 F.3d 98 (2d Cir. 2001) 7, 8

Goodman v. Georgia
(04-1236) 4, 5

Hason v. Med. Bd. of Cal.,
279 F.3d 1167, *reh'g en banc denied*,
294 F.3d 1166 (9th Cir. 2002), *cert. dismissed*,
538 U.S. 958 (2003) 5

Johnson v. California,
125 S. Ct. 1141 (2004) 6

Miller v. King,
384 F.3d 1248 (11th Cir. 2004) 3

Miranda B. v. Kitzhaber,
328 F.3d 1181 (9th Cir. 2003) 5

Moran v. Burbine,
473 U.S. 412 (1986) 8

Pace v. Bogalusa City Sch. Bd.,
___ F.3d ___, 2005 U.S. App. LEXIS 3926 (2005) ... 7, 8, 9

Phiffer v. Columbia River Correctional Inst.,
384 F.3d 791 (9th Cir. 2004) 3, 5

Scott v. Androscoggin County Jail,
866 A.2d 88 (Me. 2004) 2

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 9

Tennessee v. Lane,
541 U.S. 509, 124 S. Ct. 1978,
158 L. Ed. 2d 820 (2004) 1, 2, 3, 5

Turner v. Safley,
482 U.S. 78 (1987) 6

United States v. Goodman
(04-1203) 4

Constitutional and Statutory Provisions

U.S. Const. amend. VIII 3

U.S. Const. amend. XII 1, 2, 5, 8

U.S. Const. amend. XIV 7

I. The Title II/Eleventh Amendment issue warrants this Court's review.

Petitioners ask this Court to issue a writ of certiorari to review three questions: (1) whether Congress validly abrogated the States' Eleventh Amendment immunity to private damages claims brought under Title II of the Americans with Disabilities Act when a claim is based on alleged disability discrimination and not on the deprivation of any fundamental right; (2) whether Congress validity abrogated the States' Eleventh Amendment immunity to private damage claims brought under Section 504 of the Rehabilitation Act; and (3) whether a State's waiver of immunity under Section 504, by accepting federal funds, requires that the State's waiver must be knowing and voluntary, or whether instead it is sufficient that Congress clearly express its intent to require waiver as a condition for the receipt of federal funds. Respondent's first rejoinder is that the Title II abrogation issue does not warrant this Court's review in this case because it is premature to consider the question so soon after *Tennessee v. Lane*,[1] because this is not a "proper case" in which to address the Eleventh Amendment/Title II issue,[2] and because the Ninth Circuit Court of Appeals decision was correct. None of those points should prove telling or should dissuade this Court from reviewing the important issues raised by petitioners.

A. *Tennessee v. Lane* did not resolve the Title II issue presented here or mend the circuit split on that issue.

The petition filed in this case describes the pre-*Lane* circuit split over the issue of whether Congress validly abrogated the States' sovereign immunity to private claims for damages

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[1] 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004).

[2] (Opp. Br. 8).

brought under Title II of the ADA, with four circuits having held that, as a general matter, there was no valid abrogation, two taking less categorical positions, and one – the Ninth Circuit – standing alone in its position that States have no immunity to such claims, irrespective of the nature of the claim or the source of the right allegedly impacted. (Pet. Cert. 10-11). Respondent replies that it is too soon after *Lane* to consider the issue.

But *Lane* resulted in a narrow holding that did not decide whether Congress validly abrogated the States' Eleventh Amendment immunity outside of the context of the fundamental right of access to the courts. *See Cochran v. Pinchak*, 401 F.3d 184, 2005 U.S. App. LEXIS 4261, *3 (3d Cir. 2005) (in *Lane*, "[t]he Court was very specific in limiting its holding to cases implicating the fundamental right of access to the courts, indicating that an individual analysis would have to be performed for subsequent Title II cases involving a different scenario"); *Scott v. Androscoggin County Jail*, 866 A.2d 88, 94 (Me. 2004) (in *Lane*, the "Court left open the issue of whether immunity is abrogated in cases implicating statutory violations or other constitutional rights" than the right of access to courts); William D. Araiza, "The Section 5 Power After *Tennessee v. Lane*," 23 Pepperdine L. Rev. 39, 62 (2004) (in *Lane*, the Court "limit[ed] its holding to Title II's applicability to judicial access") (footnote omitted). Because the holding in *Lane* is so limited, there is no reason to suppose that the pre-existing circuit split will mend itself in *Lane*'s wake.

And indeed there is no sign that the split is narrowing. Respondent has not cited any case, and petitioners have not found any, in which, outside of the context of access to courts, any court has changed its pre-*Lane* position regarding the validity of the abrogation of State sovereign immunity to Title II damage claims. The Ninth Circuit's stubborn refusal to even

rethink its position on remand following *Lane* in this case is a good example of how little impact *Lane* is apt to have, and has had, on the broader issue of the validity of the abrogation outside of the context of the right of access to the courts or of other fundamental rights.

Not only is the divergence between the circuits on these issues not narrowing, it appears to be widening. Now there even is a split over the more specific issue presented here: whether the States retain sovereign immunity to damage claims based on disability discrimination that are brought by former prisoners. *Compare Phiffer v. Columbia River Correctional Inst.*, 384 F.3d 791 (9th Cir. 2004) (State's sovereign immunity abrogated no matter the basis of the former inmate's claim) *with Miller v. King*, 384 F.3d 1248, 1274-75 (11th Cir. 2004) (no valid abrogation with regard to claims based on the Eighth Amendment), *and Cochran v. Pinchak*, 401 F.3d 183, 2005 U.S. App. LEXIS 4261, *20-24 (3d Cir. 2005) (no valid abrogation with regard to claims based on equal protection).

Thus, there is no reason to wait. The holding in *Lane* was narrow and limited; the case did not resolve the significant issue presented here; and the circuit split remains and appears to be widening.

B. The Title II abrogation issue is squarely presented here and is properly before the Court.

Respondent contends that, even if it is not too soon after *Lane* to consider the Title II issue, "this would not be a proper case in which to grant review." (Opp. Br. 8). That is so, respondent asserts, because in this case he also seeks relief under Section 504 of the Rehabilitation Act, which will provide him "with all of the relief to which he would be entitled under Title II[.]" (Opp. Br. 9). Rather than issuing a writ in this case, respondent urges the Court, if it wishes to review the

Title II issue, to grant certiorari instead in *United States v. Goodman* (04-1203) and in *Goodman v. Georgia* (04-1236), where no Section 504 claim is present.

The presence of a Section 504 claim in this case is a reason why this Court should issue a writ, not a reason why it should not. In the petition, petitioners have outlined the circuit split over the significant issue of whether Congress properly abrogated the States' sovereign immunity to damage claims brought under Section 504. (Pet. Cert. 14-19). Petitioners also have asked the Court to review another issue that, although admittedly limited in the number of cases that it might impact directly, can be analytically pivotal in Eleventh Amendment cases where waiver of a State's immunity is at issue. That issue is whether, for the waiver to be valid, a State must knowingly and voluntarily waive, by its acceptance of federal funds, its constitutionally protected immunity, or whether it is instead sufficient if Congress clearly expresses its intent to require waiver as a condition for the receipt of federal funds. In this case, despite Congress's clear statement requiring waiver, the State contends that it had every reason, based on case law, to believe that it had no immunity to waive. Thus, its waiver was not a knowing one. On that issue, the parties take directly opposing positions.

The fact that respondent could obtain under Section 504 "all of the relief to which he would be entitled under Title II" (Opp. Br. 9) presupposes that the State has waived its sovereign immunity here, which is one of the issues petitioners ask this Court to review. Thus, that fact is no impediment to review.

The fact that the *Goodman* case is before the Court also does not counsel against a grant of a writ here. Resolution of the broader Title II issue presented here has proved elusive. *See, e.g., Hason v. Med. Bd. of Cal.*, 279 F.3d 1167, *reh'g en banc denied*, 294 F.3d 1166 (9th Cir. 2002), *cert. dismissed*,

538 U.S. 958 (2003). For that reason, it might be prudent to grant review in both cases, rather than to choose between them. If a choice must be made, respondent suggests that the choice should be *Goodman* because it "arises on a full summary judgment record." (Opp. Br. 10). But the existence of a factual record, as opposed to review of respondent's complaint only, might well be a reason to prefer this case over *Goodman*. The issues, after all, are legal ones, not factual.[3]

Respondent also suggests that *Goodman* is the better vehicle for review because he does not contend that the State's conduct violated his constitutional rights. (Opp. Br 11). It is impossible to square that assertion with his latter claim that "fundamental right[s]" are at issue here. (Opp. Br. 13 n. 6). Particularly after *Lane*, it also is difficult to believe that respondent does not base his claim on the Equal Protection Clause, as well as on Title II itself.

C. No fundamental rights are involved in this case.

Respondent appears to suggest that because the events that led to this case took place when he was in prison, his claim is entitled to some kind of heightened scrutiny. (Opp. Br. 12-13). He notes, for example, that "[t]his case arises in 'the

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[3] In its petition filed in *Goodman*, the United States suggests that case is the preferable choice because in *Phiffer* the government was not notified "that a challenge to Title II's constitutionality was pending and, as a result, the United States did not participate in that case in defense of Title II below." (*Goodman* Pet. Cert. 17-18). That claim borders on the disingenuous. When *Phiffer* first was before the Ninth Circuit, it was submitted to the same panel on the same day as *Miranda B. v. Kitzhaber*, 328 F.3d 1181 (9th Cir. 2003). The United States participated in that case and sent an attorney from Washington D.C. to argue it. In addition, both times the State has filed petitions seeking certiorari in *Phiffer* it has served those petitions on the United States.

prison context, when the government's power [over an individual] is at its apex,'" (Opp. Br. 12, quoting *Johnson v. California*, 125 S. Ct. 1141, 1150 (2004)), and he claims that, "[i]n that context at least, Title II is plainly a congruent and proportional response to actual and threatened violations of the Fourteenth Amendment." Respondent has it exactly backwards.

"[P]rison administration is a task that has been committed to the responsibility of the legislative and executive branches. Separation of powers considerations counsel a policy of judicial restraint in prisoners' rights cases." *Cochran*, 2005 U.S. App. LEXIS at * 19, citing *Turner v. Safley*, 482 U.S. 78, 85 (1987). "In *Turner*, the Court held that 'when a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *Id.*, citing *Turner*, at 89. It is the disparity between that deferential standard of review and what Title II requires that demonstrates that Title II is not a congruent and proportional response. *Id.* at *23 ("Title II's obligation to include 'disabled' prisoners in all 'services, programs, or activities' conflicts with the States' right to impose classifications on disabled prisoners").

Respondent also suggests that some form of fundamental right is implicated in this case, although he gives no hint as to what that right might be. (Opp. Br. 13 n. 6). In fact, no such right is involved. Respondent simply has claimed that the State failed reasonably to accommodate his alleged disabilities when he participated in programs while in prison.

II. The waiver and Section 504/Eleventh Amendment issues merit review.

A. Contrary to respondent's contention, this case does implicate a conflict in the circuits regarding waiver of sovereign immunity to Section 504 claims.

Respondent contends that this case "does not implicate any conflict in the circuits concerning Section 504's waiver of sovereign immunity." (Opp. Br. 15). Yet respondent admits that there is a split between the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98 (2d Cir. 2001), and decisions rendered by other circuits. (Opp. Br. 16-17). And, although as respondent notes, the *en banc* Fifth Circuit decision in *Pace v. Bogalusa City Sch. Bd.*, ___ F.3d ___, 2005 U.S. App. LEXIS 3926 (2005), reversed the panel decision on which petitioners have relied, the deep division in the *en banc* court only serves to underscore the analytical tension between waiver analysis and Spending Clause authority that petitioners ask this court to review. In their petition, petitioners argued that this Court's statements regarding the requirement that a State's waiver of its sovereign immunity must be knowing and voluntary, and the Court's statements about the extent of Congress's Spending Clause authority, "have drawn courts in opposite directions and, thus appear to have led, at least in part, to the circuit split." (Pet. Cert. 20). Or, as Judge O'Scannlain put it in a decision dissenting from the denial of rehearing *en banc*, "[e]ach doctrine pulls [a court] in an opposite direction." *Douglas v. California Dept. of Youth Auth.*, 285 F.3d 1226, 1226 (9th Cir. 2002) (O'Scannlain, J., dissenting). The majority and dissenting decisions in *Pace* provide a striking example of that tension.

In *Pace*, the eight-judge majority gave lip service to the requirement that a State's waiver of its sovereign immunity must be knowing and voluntary, but the majority then substituted the expression of *Congress's* intention that a State waive

its immunity for any knowing and voluntary waiver *made by the State*. The majority held that "the only 'knowledge' that the Court is concerned about is a state's knowledge that a Spending Clause condition requires waiver of immunity, not a state's knowledge that it has immunity it could assert." *Pace*, 2005 U.S. App. LEXIS at *17. That holding is contrary to this Court's statement in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680-81 (1999), that "[t]here is a fundamental difference between a State's expressing unequivocally that it waives its immunity, and Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." The holding also is at odds with the Second Circuit's decision in *Garcia*. Furthermore, as the six judges who dissented from that holding in *Pace* observed, the court's decision is in conflict with waiver analysis generally, including the doctrine that "'waiver must be made with full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Pace*, at * 79, (Jones, J., concurring in part and dissenting in part) quoting *Moran v. Burbine*, 473 U.S. 412, 421 (1986). The dissenting judges posed this analogy:

> the police instruct a criminal defendant, "for his own good," to sign a waiver of counsel form, while telling him that the waiver is "meaningless, because you have no counsel rights to waive." Who would argue that the waiver is knowing, especially if the police showed him a court decision confirming this view? That the dupe is an individual defendant rather than the State does not, per *College Savings*, make this a different case, nor does the fact that the waiver falls under the Spending Clause rather than some other type of enact-

> ment. The majority's opinion violates *College Savings Bank.*

Pace at * 92.

Here, it also was the State that was duped. In 1997 and 1998, when respondent was an inmate in the State's prisons, even *Garrett* had not yet been decided,[4] and the State faced binding precedent from the Ninth Circuit holding that it had no sovereign immunity to waive, as the State still does today. *See, e.g. ,Clark v. California*, 123 F.3d 1267, 1269 (9th Cir.1997).[5]

B. The waiver issue is a significant one, and the question of whether Section 504 validly abrogates States' immunity is not "purely academic," as respondent suggests.

Respondent argues that the waiver issue presented here is of little significance because it will impact only a few cases that arose "during a very narrow time period." (Opp. Br. 22). As noted above, the time period may not be as limited as respondent suggests. In all events, admittedly it is not the number of cases that will be directly affected that makes the waiver issue presented here a significant one. It is instead the fundamental tension between waiver analysis and Spending Clause jurisprudence that warrants this Court's attention. That is an issue that is not limited to any one set of cases.

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[4] *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

[5] Respondent argues that the State must have known that it had immunity to waive because *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), had been decided. (Opp. Br 16-18). But those cases did not settle the immunity issues raised here, which still have not been finally resolved by this Court.

The issue of whether Congress validly abrogated State sovereign immunity is not "purely academic." (Opp. Br. 22). Respondent contends that it is based on his assumption that the State waived its immunity. But the validity of that waiver and whether it was knowing and voluntary is an issue that is before the Court.

CONCLUSION

For the reasons discussed in the petition for a writ of certiorari, as well as those discussed above, petitioners respectfully request that this Court grant the petition for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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April 22, 2005